IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

FLOWSHARE, LLC, a Delaware limited liability company, and ERIC D. FOGLE	)	
Plaintiffs/Counterclaim Defendants,	)	
v.	)	C.A. No.: N17C-07-227 EMD CCLD
GEORESULTS, INC., a Georgia corporation, THOMAS E. SHIELDS and DAWN SHIELDS,	)	
Defendants/Counterclaim Plaintiffs.	)	

Submitted: December 23, 2019
Decided: April 9, 2020

DECISION AFTER TRIAL

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DAVIS, J.

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This civil action is assigned to the Complex Commercial Litigation Division of the Court. The claims in this civil action relate to the purchase of the assets of GeoResults, Inc. ("GeoResults"). On November 6, 2015, FlowShare, LLC ("FlowShare")[1] and GeoResults

[1] FlowShare is also affiliated with FlowShare Holding Company, LLC, ShareTracker, LLC and FlowShare Employment Group, LLC. According to the parties, FlowShare does business as "ShareTracker." In the post-trial briefing, both parties define FlowShare as ShareTracker. Unless otherwise indicated, the Court will use FlowShare

entered into an asset purchase agreement (the "APA"). Under the APA, FlowShare purchased substantially all of GeoResults' assets.

Eric D. Fogle is the CEO and owner of FlowShare. Thomas E. Shields founded GeoResults and Dawn Shields was the CFO of GeoResults. Mr. Fogle and FlowShare entered into a separate agreement (the "Shortfall Agreement") with Mr. and Mrs. Shields. Under the terms of the Shortfall Agreement, Mr. Fogle personally guaranteed that he, in conjunction with FlowShare, would pay $8 million for GeoResults. Mr. Fogle and FlowShare entered into the Shortfall Agreement to assure Mr. and Mrs. Shields that they would be paid in full under the APA, and to supplement the consideration under the APA's terms.

FlowShare (aka ShareTracker) and Mr. Fogle (collectively, the "Plaintiffs") brought this action on July 21, 2017. Plaintiffs filed an Amended Complaint on October 20, 2017. GeoResults, Mr. Shields and Mrs. Shields (collectively, the "Defendants") filed their answer and counterclaims on November 3, 2017. Plaintiffs raise four claims: (i) breach of the APA, (ii) declaratory judgment with respect to the APA, (iii) fraudulent inducement with respect to the APA, and (iv) declaratory judgment that the Shortfall Agreement is unenforceable. Defendants answered Plaintiffs' claims and asserted five counterclaims: (i) declaratory judgment that Defendants did not breach the APA, (ii) breach of the Shortfall Agreement, (iii) unjust enrichment, (iv) promissory estoppel, and (v) fraud in the inducement (collectively, the "Counterclaims").

On December 22, 2017, Plaintiffs filed a reply to the Counterclaims and asserted the following affirmative defenses: (i) failure to state a claim, (ii) unclean hands, (iii) failure of a condition precedent, (iv) fraud, (v) vagueness, (vi) unconscionability, (vii) waiver, (viii) public

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and/or ShareTracker interchangeably, *i.e.*, FlowShare to mean both FlowShare and ShareTracker, and ShareTracker to mean both FlowShare and ShareTracker.

policy, (ix) reformation.[2] Plaintiffs filed a motion to dismiss Counterclaim V, which the Court denied on July 25, 2018.[3] The Court found that Defendants may only pursue Counterclaim V as an alternative to Counterclaim II.[4]

On September 27, 2018, Defendants filed a motion for summary judgment ("Defendants' Motion") seeking judgment on all of Plaintiffs' claims. Then, Plaintiffs filed a motion for summary judgment ("Plaintiffs' Motion") on October 10, 2018 seeking judgment on all of Defendants' counterclaims (collectively, the "Motions"). On December 14, 2018, the Court held a hearing on the Motions. On March 25, 2019, the Court denied the Plaintiffs' Motion (the "Summary Judgment Opinion").[5] The Court granted the Defendants' Motion in part, leaving Plaintiffs' claims for breach of the APA and declaratory judgment for trial. The Court also held that, as to Defendants' counterclaims, the Shortfall Agreement was enforceable and that damages would be determined at trial. The Court issued its Corrected Opinion on April 3, 2019.

II. THE TRIAL

The Court conducted a bench trial from April 8, 2019 through April 12, 2019 (the "Trial"). The Parties then filed post-trial briefs. The Court held closing arguments on October 8, 2019. The final transcript was docketed on December 23, 2019.

A. WITNESSES

During the Trial, the Court hear from and considered testimony from the following witnesses:

Eric D. Fogle
James F. Kenny

[2] Pls. Reply and Affirmative Defenses to Countercl. p. 33-36.
[3] *FlowShare, LLC v. GeoResults, Inc.*, 2018 WL 3599810 (Del. Super. July 25, 2018).
[4] *Id.* at *6.
[5] *FlowShare, LLC v. GeoResults, Inc.*, C.A. No. N17C-07-227 EMD CCLD (Del. Super. Mar. 25, 2019) (Hereafter the "Summary Judgment Op."). The Court corrected its initial decision to make a correction as to a fact. The Court mistakenly provided that the parties "re-signed" the Shortfall Agreement on November 9, 2016.

Ryan Verkamp
Chris King
Thomas E. Shields
Dawn Shields
Thomas Stephens

All witnesses testified on direct and were available for cross-examination. The fact witnesses were Mr. Fogle, Mr. Kenny, Mr. Verkamp, Mr. Shields and Ms. Shields. The Plaintiffs used Mr. King as their expert witness on damages. The Defendants presented Mr. Stephens as their damages expert. Plaintiffs also lodged deposition transcripts for Rebecca Cunningham and Geoffrey Levy. Ms. Cunningham is an attorney for GeoResults. Mr. Levy is an executive for Windstream Communications, Inc. ("Windstream").

B. EXHIBITS

The parties submitted an extensive number of exhibits. Most of these exhibits were admitted without objection. For purposes of this decision, the Court has designated exhibits submitted by FlowShare as "PX- __" and the exhibits submitted by GeoResults as "DX- __."

III. FINDINGS OF FACT

The Court notes that, to the extent any of these findings of fact are more appropriately viewed as conclusions of law, the finding of fact will also be deemed a conclusion of law.[6]

Jurisdiction is proper in this Court because FlowShare and Defendants agreed, in the APA, to a forum selection clause that states that disputes will be resolved in Delaware courts.[7]

A. THE PARTIES

FlowShare, which does business under the names FlowShare and ShareTracker, is a Delaware limited liability company with its principal place of business in Ashland, Missouri.[8]

[6] *See Bay City, Inc. v. Williams*, 2 A.3d 1060, 1061-62 (Del. 2010); *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010); *Reserves Dev. LLC v. Crystal Props., LLC*, 986 A.2d 362, 367 (Del. 2009).
[7] Am. Compl. ¶ 7.
[8] *Id.* ¶ 2.

FlowShare performs market research on telecommunications companies' market share, analyzes its findings and then compiles reports.[9] Mr. Fogle is a resident of the state of Missouri.[10] He is the co-founder of FlowShare and its president and CEO.[11]

ShareTracker was established in 2003 by Mr. Fogle. ShareTracker does business under the name FlowShare.[12] Mr. Fogle is the chief executive officer of ShareTracker and Mr. Verkamp is its chief financial officer.[13] ShareTracker claims to be "the largest Telecom market research company in the U.S." and offers "the most comprehensive set of aggregate share and record databases available serving the Wireless/Wireline, Telephony/Broadband/Video segments, with Business/Residential analytics."[14]

GeoResults is a Georgia corporation with its principal place of business in Alpharetta, Georgia.[15] Mr. and Mrs. Shields are residents of the state of Georgia.[16] Mr. and Mrs. Shields were the sole shareholders of GeoResults at the time of the acquisition.[17]

GeoResults was founded in 2001.[18] GeoResults was a telecom company that provided databases, data cleansing, and compilation services.[19] Prior to GeoResults' acquisition in 2015, Mr. Shields was GeoResults' chief executive officer and Ms. Shields was its chief financial officer.

[9] *Id*. ¶ 9; April 8, 2019 Tr. at 41-42. Hereafter, transcript references will be cited as "Tr. Day_ at __".
[10] Am. Compl. ¶ 3.
[11] *Id*. ¶ 48.
[12] Tr. Day 1 at 254.
[13] *Id*. 257.
[14] https://ShareTracker.com/about/.
[15] Am. Compl. ¶ 4.
[16] *Id*. ¶ 5.
[17] *Id*.
[18] Tr. Day 4 at 101.
[19] *Id*. at 101-115.

GeoResults provided services to a wide variety of customers ranging from other telecom companies to credit monitoring companies and law firms.[20] As demonstrated during Trial, GeoResults reported revenue in the amount of $6,527,000 and adjusted EBITDA of $2,292,000 in fiscal year 2014.[21]

B. THE TRANSACTION AND APA

1. *Due Diligence*

Mr. Fogle testified that, in 2013, he made a determination that ShareTracker should grow.[22] At this point, Mr. Fogle began to look for potential acquisition targets that included "companies that are in the same industry, potentially of size and scope that an investment of $6 million would allow us to be able to buy them that there would be some synergistic opportunities."[23]

Mr. Fogle noted that he identified GeoResults as a potential target because he had "seen them in a couple trade shows" and was familiar with the company.[24] Mr. Fogle decided to move forward and attempt to acquire GeoResults.[25]

FlowShare and GeoResults entered into a Letter of Intent ("LOI") on September 16, 2014.[26] Mr. Fogle had previously been involved in "three or four" similar transactions.[27] At Trial, Mr. Fogle testified that he drafted parts of the LOI himself.[28]

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[20] PX-37.
[21] PX-35 at 21588. According to testimony, these amounts reflect adjusting accounting from cash to accrual. Tr. Day 5 AM at 132-133.
[22] Tr. Day 1 at 55.
[23] *Id*. at 57.
[24] *Id*. at 59.
[25] *Id*. at 256.
[26] DX-143.
[27] Tr. Day 1 at 255.
[28] *Id*. at 260.

The LOI provides that FlowShare was interested in GeoResults because it was seeking "to grow into the 'Tier 2' level companies."[29] In addition, FlowShare was looking to cross sell its products to existing GeoResults' customers and cross sell GeoResults' products to customers of FlowShare/ShareTracker.[30] The LOI anticipated that FlowShare would purchase GeoResults for $8 million and allowed time for due diligence.[31]

FlowShare and Mr. Fogle undertook due diligence for fourteen (14) months. The due diligence included four audits of GeoResults. GeoResults also provided FlowShare access to reference checks, legal, tax, and accounting records, vendors, customers, and customer contracts.[32] Mr. Fogle testified that he considered customer calls or direct comments from customers as the best form of due diligence.[33]

During the due diligence process, GeoResults converted from a cash accounting system to an accrual-based accounting system as part of the process and in order to complete the deal.[34]

2. *The APA*

FlowShare, GeoResults, Mr. Shields and Mrs. Shields entered into the APA on November 6, 2015.[35] The APA identifies FlowShare as the "Purchaser," GeoResults as the "Seller," and Mr. and Mrs. Shields collectively as the "Owners."[36] It is through the APA that FlowShare/ShareTracker acquired GeoResults.[37]

[29] DX-143.
[30] Tr. Day 1 at 262.
[31] *Id.* at 259-267; Tr. Day 5 AM at 83.
[32] Tr. Day 1 at 271-274.
[33] *Id.* at 307.
[34] *Id.* at 272.
[35] PX-1/DX-508.
[36] *Id.*
[37] Tr. Day 5 AM at 56.

The effective date of the APA is November 6, 2015, and the transaction closed on the same date.[38] The purchase price set forth in the APA was $4,420,000 subject to certain adjustments.[39] The APA provided for an Escrow amount of $500,000 to be held in an account for a period of 12 months post-closing.[40] The parties also entered into an Escrow Agreement on November 6, 2015.[41]

The APA also provided a number of representations and warranties. Relevant sections include Sections 4.05, 4.09, 4.11, and 4.20.

Section 4.05 provides in pertinent part:

> Seller has conducted the operations of the Business only in the Ordinary Course of Business and there has not occurred any Material Adverse Effect or any fact, event, change, development or effect that (individually or when taken together with any other facts, events, changes developments or effects) would reasonably be expected to, result in any Material Adverse Effect . . . since December 31, 2014, and other than in the Ordinary Course of Business, Seller has not had any . . . (v) acceleration, termination, expiration, material modification to or cancelation of any material Assumed Contract or Permit.[42]

Section 4.09(c) provides (in part):

> Seller hereby represents and warrants that . . . (iii) no event has occurred which with notice or lapse of time or both . . . would constitute a breach or default, or permit termination, modification, or acceleration of and no party has any intention to terminate, modify . . . or accelerate any Material Contract[.][43]

Section 4.11 provides (in part):

> (i) no Material Customer has advised Seller that such customer intends to stop, decrease, accelerate or delay the rate of purchasing products or services from Seller, in any material respect, at any time after the date hereof and (ii) no Material Customer has provided notice or information to Seller that it intends to materially

[38] PX-1.
[39] *Id*. at § 3.02(a).
[40] *Id*. at § 3.02(b)(ii), Ex. A § 2.1.
[41] *Id*. at Ex. A, Escrow Agreement.
[42] *Id*. at § 4.05. The APA defined "Material Adverse Effect" to mean, "any change, effect event, occurrence, state of facts, development or circumstance that, individually or in the aggregate, is or would reasonably be expected to be materially adverse to (a) the business, assets, condition, prospects, or operations of the Business, taken as a whole . . .." *Id.* at § 1.01.
[43] *Id*. at § 4.09(c).

> reduce the volume of business that it currently conducts with Seller or to cease doing business with Seller.[44]

Finally, Section 4.20 provides:

> To the Knowledge of Seller, no representation or warranty by Seller in this Agreement and no statement contained in the Disclosure Schedules to this Agreement . . . contains any untrue statement of material fact, or omits to state a material fact necessary to make the statements contained therein, in light of the circumstances in which they are made, not misleading.[45]

Section 8.02 of the APA provides that GeoResults will indemnify FlowShare for breaches of GeoResults' representations and warranties:

> [GeoResults] and [Mr. and Mrs. Shields] shall, jointly and severally, indemnify, defend, protect, and hold harmless [FlowShare] and its successors and permitted assigns, and each of their respective Affiliates, officers, managers, members, employees and Representatives (collectively, the "Purchaser Indemnitees") for, from and against any and all Losses imposed upon or incurred by the Purchaser Indemnitees (or any one of them), directly or indirectly, arising out of . . . any Breach of any representation or warranty of [GeoResults] or [Mr. and Mrs. Shields] set forth in this Agreement or given or made by [GeoResults] or [Mr. and Mrs. Shields] in any other Transaction Document . . . .[46]

The Escrow Agreement creates a "Permitted Claims Period."[47] The Permitted Claims Period began on the Closing Date and continued for the earlier of one year or upon the exhaustion of the funds in the Escrow.[48] The Escrow Agent would pay the remaining escrow amount to Mr. and Mrs. Shields upon completion of the Permitted Claims Period—*i.e.*, the one-year anniversary of the Closing Date.[49] If, during the Permitted Claims Period, FlowShare had valid claims under APA Article VIII, the Escrow Agent was to make payments from the Escrow to FlowShare for those claims.[50]

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[44] *Id.* at § 4.11.
[45] *Id.* at § 4.20.
[46] *Id.* at § 8.02.
[47] *Id.* at Ex. A, Escrow Agreement § 2.1.
[48] *Id.*
[49] *Id.* at Ex. A, Escrow Agreement § 2.3.
[50] *Id.* at Ex. A, Escrow Agreement § 2.2.

3. *The Shortfall Agreement*

As part of the overall transaction, Mr. Fogle, FlowShare, Mr. Shields and Mrs. Shields also entered into the Shortfall Agreement.[51] In the Shortfall Agreement, Mr. Fogle and FlowShare jointly obligated themselves to total payments of $8 million for the sale of GeoResults, and agreed to pay Mr. and Mrs. Shields an amount such that their total compensation from the APA and the Shortfall Agreement would be $5.5 million.[52]

The Shortfall Agreement provides that FlowShare and Mr. Fogle will: (i) compensate certain employees as identified in the Shortfall Agreement; and (ii) compensate for deficiencies between the total received under the APA at closing and $5.5 million. FlowShare and Mr. Fogle promised to make these payments by employing Mr. and Mrs. Shields and periodically paying them a salary until they had been paid at least $5.5 million.[53] The Shortfall Agreement expressly provides:

> If the total consideration received by Seller [GeoResults] and Owners [Mr. and Mrs. Shields] from the closing of the APA and the Real Estate Purchase Agreement is less than Five Million Five Hundred Thousand Dollars ($5,500,000.00), Purchaser [FlowShare] shall employ Owners at the rate of pay specified in their employment agreements with FLOWSHARE EMPLOYMENT GROUP, LLC for the time period necessary for Owners to receive compensation income equal to the difference (the "Shortfall") between Five Million Five Hundred Thousand Dollars ($5,500,000.00) and the amount of total consideration received pursuant to the closing of the APA and Real Estate Purchase Agreement. Total consideration from the APA and Real Estate Purchase Agreement shall mean the cash paid to Seller and Owners at Closing, plus the Escrow Amount, plus cash on hand retained by Seller. [ ]
>
> The Shortfall shall be increased by all adjustments due to Seller and Owners for tax consequences of stock versus asset sale, salary versus purchase price and capital gains versus ordinary income. This additional tax adjustment ("Tax Shortfall") payment calculation will not begin until after the previous Shortfall to the Seller(s) and Owner(s) is satisfied and will be paid within 30 days.[54]

[51] Summary Judgment Op. at 6; PX-182.
[52] Summary Judgment Op. at 6-7; PX-182 at 2.
[53] Summary Judgment Op. at 6-7.
[54] *Id.* at 7; PX-182.

Both the APA and Shortfall Agreement provide for a tax true-up to be paid to Mr. and Mrs. Shields in the amount of the difference of the tax consequences if the transaction had been a stock sale in lieu of an asset sale.[55] Additionally, the Shortfall Agreement provides for a tax true-up for Mr. and Mrs. Shields to be made whole with respect to ordinary income versus capital gains tax rates.[56]

The final paragraph of the Shortfall Agreement provides, "[t]his agreement is independent of and in addition to the APA. The obligations of Purchaser [FlowShare] in this agreement are the joint and several obligations of Purchaser and Eric Fogle."[57]

The Shortfall Agreement is dated November 9, 2015.[58]

The Court found troubling the fact that Mr. Fogle seemed to conceal the existence of the Shortfall Agreement from Mr. Verkamp.[59] As stated above, Mr. Verkamp is the CFO of FlowShare/ShareTracker. Mr. Fogle's pattern of deception can be concretely shown through two email exchanges.

First, in an email exchange with Mr. Shields and Mrs. Shields prior to closing (November 3, 2015), Mr. Fogle sets out the "money flow (worst case)" in the transaction to GeoResults and Mr. and Mrs. Shields.[60] Mr. Fogle then forwards these emails to Mr. Verkamp. Mr. Verkamp reviews the emails and writes:

> I think you know this, but you are giving the Shields different messages than Tracy and myself. You are referencing a shortfall below and have all your math adding up to $5.5 million without taking into the consideration of the liability assumed of $500K.

[55] PX-1/DX-508; PX-182.
[56] PX-182; Tr. Day 5 AM at 156.
[57] Summary Judgment Op. at 7; PX-182.
[58] PX-182.
[59] DX-725; DX-186.
[60] DX-725; DX-186.

> I am not sure what you are willing to commit to them as far as employee agreements go but we only have so much cash. If I was you I would not commit to any "shortfall" as I am not sure we have enough cash to pay the Shields more than a few months. All my CF projections have them leaving after 60 days post close. Now that the key employees have bonuses going to them in the form of cash we are going to be really tight.
>
> I urge you to put Dawn in her place and make her realize there isn't a $500K shortfall.[61]

Mr. Verkamp seems to be proposing disclosure and/or clarification. Mr. Fogle, however, rejects Mr. Verkamp's suggestion to communicate cash flow issues with Mrs. Shields. Without referencing the Shortfall Agreement, Mr. Fogle responds:

> You are 100% correct. This is what makes me the silver tongued devil (per Jerome). The 'there is no shortfall' conversation is much easier to have after they have the first $4M in hand and we cut them off. I won't steal from them, but I also know we can't overpay.[62]

After receiving this, Mr. Verkamp—who clearly is unaware of the Shortfall Agreement and its implications—now seemingly rejects an ethical approach of disclosure. Instead, Mr. Verkamp writes back with "[o]k you silver tongued devil – keep working your magic."[63]

Second, the Court's findings are supported by a November 4, 2015 email exchange between Mr. Fogle and Mrs. Shields.[64] Mrs. Shields writes to Mr. Fogle and Mr. Verkamp:

> Please confirm my understanding.
>
> Today RLJ will wire to Ted and Dawn's personal account $3,919,398 (Closing Cash Payment $4,420—WC adjustment of $500,602) and $500,000 to the Escrow Agent. We of course can check our personal account when you tell us the money is there, and you will provide confirmation that the wire went to the escrow company. When you refinance we will receive the $315,000 for the Real Estate. We will keep $300,000 in cash (we may be somewhat short of that). So before any WC true ups and true ups for the tax adjustment for stock vs. asset sale, ordinary income v. capital gains (payment of shortfall as salary vs. part of PP at closing)

[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] DX-186.

> looks like we receive $5,034,398 so the current shortfall is $465,602. Am I correct?[65]

Mr. Fogle reviews and, in an email that does not include Mr. Verkamp, responds:

> You are correct to the dollar. Just a reminder, Ryan is currently unaware of the existence of our [Shortfall Agreement]. As CFO (and as a CPA), he can't know before the deal is complete. I will let him know about 15 minutes after we close and the money is in your account.[66]

The Court notes that the lack of credibility of Mr. Fogle and Mr. Verkamp, in part, comes from this exchange. Instead of being forthcoming, Mr. Fogle (and to some extent Mr. Verkamp) withheld information from Mrs. Shields, and clearly thought he could re-trade a deal he just made after closing on the APA. Mr. Verkamp seems to be fine with this type of disingenuous conduct. The magic being somewhere between ethical disclosure and "stealing."

4. *The Employment Agreements*

As set forth in the Shortfall Agreement, FlowShare Employment Group, LLC entered into two employment agreement—one with Mr. Shields and one with Mrs. Shields. Mrs. Shields' employment agreement is dated November 7, 2015. The employment agreement with Mr. Shields is dated November 10, 2015.

C. WINDSTREAM

The testimony at Trial showed that GeoResults had a number of different customers. For purposes of the claims raised in this civil proceeding, the relevant customer is Windstream. Windstream had been a customer of GeoResults since 2007.[67] Prior to FlowShare's acquisition of GeoResults, Windstream was GeoResults' largest customer by revenue.[68] Although,

[65] *Id*.
[66] *Id*.
[67] Pre-Trial Order (D.I. No. 137), undisputed fact 12.
[68] PX-35 at 21614.

Windstream was the largest customer, Windstream was not GeoResult's most profitable one.[69] The loss of Windstream as a customer forms the basis for each of Plaintiffs' breach of contract claims.

1. The Windstream Agreement

At all times relevant here, GeoResults and Windstream were operating under a Master Services Agreement, dated February 10, 2010 (the "Windstream Agreement").[70] Importantly, Windstream had the right to early termination of the Windstream Agreement upon 30-days' notice.[71] Windstream's right to early termination of the Windstream Agreement was in its sole discretion.[72]

Under the Windstream Agreement, individual projects between GeoResults and Windstream were governed by separate statements of work (the "Windstream SOW").[73] The operative Windstream SOW at the time of the APA's Effective Date was Windstream SOW4. [74] Windstream SOW4 was dated December 24, 2014.[75]

Windstream SOW4 was a "fixed price project assignment."[76] The fixed price was $750,000 annually[77] for a three-year period (2015-2017) and was subject to a "prompt payment discount" for payments made within fifteen days.[78] The evidence at Trial demonstrated that Windstream always took advantage of that prompt payment discount.[79] Invoices for the services

[69] *Id*.
[70] DX-451.
[71] *Id*. at § 4.5.
[72] *Id*.
[73] *Id*.
[74] DX-452.
[75] *Id*.
[76] *Id*.
[77] *Id*. at Article V.
[78] *Id*. at Article XVII.
[79] Tr. Day 1 at 143; Tr. Day 3 at 106.

to be provided by GeoResults were billed on January 1 of the applicable year.[80] If Windstream wanted to exercise early termination of Windstream SOW4 under the Windstream Agreement, Windstream was required to give notice thirty days prior to January 1, or otherwise it would be required to pay the full contract amount for the following year.[81]

Mr. Fogle testified that, during the due diligence period, he had the opportunity to review the Windstream Agreement and Windstream SOW4.[82] Mr. Fogle was therefore aware—or should have been aware—of the contents of the Windstream Agreement, including the termination provision. Mr. Fogle stated that the termination provision was "a standard term. Actually I think it's nice that they give you 30 days' notice. Most of these say at any time with or without notice."[83]

2. GeoResults' Marketplace and Windstream

Trial testimony demonstrated that GeoResults' market was competitive. With respect to Windstream, Mr. Shields and Mr. Fogle acknowledged there was competition for the account between Windstream and GeoResults. Mr. Shields testified that he knew that there was "competition in the account" and that competitors were "sniffing around the account" during renewal season.[84] Mr. Shields notified Mr. Fogle about competition in the account during a teleconference on October 8, 2015.[85] Mr. Fogle indicated that he was not concerned on the call.[86]

[80] DX-452 at Article VIII.
[81] DX-451 at § 4.5.
[82] Tr. Day 1 at 274-277.
[83] *Id*. at 140.
[84] Tr. Day 4 at 152-154, 162-168.
[85] *Id*. at 153. Mrs. Shields kept notes of all the Shieldses' conversations with Mr. Fogle. Tr. Day 5 AM at 61-62.
[86] Tr. Day 4 at 154.

Mr. Fogle testified that competition was business as usual and normal in the industry—particularly at the end of the year (even on a multi-year contract):[87]

> Q. Mr. Fogle, is competition for accounts normal?
>
> A. Yes.[88]

Mr. Fogle was also aware that Dun & Bradstreet ("D&B") and "TNS" were trying to obtain Windstream as a customer. Mr. Fogle testified:

> Q. And, in fact, you specifically knew that D&B wanted Windstream as a customer?
>
> A. Yes.[89]

As to TNS, Mr. Fogle stated that he was aware that TNS was interested in replacing GeoResults:

> Q. And I you think you testified that you were aware not only D&B was competing but D&B – not only was D&B in the account but was TNS was also in the account, right?
>
> A. Not necessarily in the account but definitely interesting in servicing that account as an opportunity to replace GeoResults.
>
> Q. You knew there was a competitor talking to the customer trying to replace GeoResults, right?
>
> A. Yes.
>
> Q. As someone involved in the industry for a number of years, I think you said, that's common practice, right?
>
> A. I have multiple competitors and I think they'd all be interested in providing the services we provide to our clients.[90]

Mr. Fogle believed that this type of competition was common.[91] Mr. Fogle understood that multi-year terms on contracts did not prevent the loss of a customer because many contracts in

[87] Tr. Day 1 at 162-163, 243-244, 279.
[88] *Id.* at 243.
[89] *Id.* at 163.
[90] *Id.* at 286.
[91] *Id.*

the industry provided for early termination.[92] As such, competition increased during renewal periods and year-end as customers would demand increased services and lower prices.[93]

Examination of customer contracts at year-end generally fell under the umbrella term of "renewals." Mr. Shields testified:

> A. It's a term we use in our company that means that at the end of every year a contract would be up for renewal. Some of the contracts actually ended at the end of that year and you had to physically renew it.
>
> In a multi-year deal at the end of every year usually that's when a customer would leave if they had any plans to, or competition would come in at the end of the year and take or try to take it from you, or they would make changes, modifications to the SOW, either small or large.
>
> Telephone companies were always changing their footprints, the market they were going after, their sales plans would change every year, sometimes multiple times a year. So we would go in and try and get the renewal to get the new procedures that they would want to see for the upcoming year, get it documented and put it as an amendment to the SOW so that we could make sure we were providing them exactly what they wanted.[94]

Mr. Fogle testified similarly regarding this process[95] and talked about communicating with customers, even on the second or third year of an existing agreement, so that GeoResults could understand the customer's expectations for the following years.[96] Mr. Fogle also used the term "renewal" in emails and other documents—and in relation to multi-year contracts, such as the Windstream Agreement.[97]

On October 8, 2015, Mr. Fogle emailed Mr. and Mrs. Shields, outlining the "current 'worst case' cash plan" concerning payments to GeoResults' employees.[98] Mr. Fogle noted that

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[92] *Id*. at 140.
[93] *Id*. at 267-269
[94] Tr. Day 4 at 129-130.
[95] Tr. Day 1 at 267-269
[96] *Id*. at 268-269.
[97] PX-165; DX-690 at 2; DX-399; Tr. Day 1 at 203.
[98] DX-690 at 2.

his current plan anticipated "…we get all of your renewals (especially Windstream)."[99] Mr. Fogle also discussed the possibility of losing customers through "renewal season."[100] Understanding this, Mr. Fogle negotiated an employment agreement with Mr. Kenny that provided a $100,000 incentive for "renewal" of the Windstream Agreement.[101]

3. Third and Fourth Quarter of 2015

The evidence demonstrates that the 2015 renewal season (third and fourth quarter 2015) saw competition for the Windstream account—this time from, at the very least, a company called Acxiom.[102]

Geoff Levy was Vice President of Marketing Operations in the business unit for Windstream.[103] Mr. Levy was the final decision maker with respect to procurement, including the products and services being provided by GeoResults under the Windstream Agreement.[104] Mr. Levy was continually exploring pricing and additional products, and, in September of 2015, Mr. Kenny was communicating with Windstream with respect to providing additional services.[105]

Mr. Levy was involved in many internal Windstream meetings between September and November of 2015—as frequently as once a week, if not more—concerning the procurement of services, which included the products provided by GeoResults.[106] Included in these meetings was Stephen Gingerich, GeoResults' primary contact at Windstream, as well as Nicholas

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[99] *Id.*; *see also* DX-399 (describing how future cash flow issues were due, in part, to "Windstream (Geo) not renewing").
[100] *Id*.
[101] Tr. Day 1 at 203; PX-165.
[102] Acxiom was a re-seller of primarily consumer data. Acxiom was not involved in business data and did not have the ability to provide telecom data without collaborating with someone else. Tr. Day 2 PM at 25; Tr. Day 3 at 21; Tr. Day 4 at 174.
[103] Levy Dep. at 16:10, 25:15-19.
[104] *Id.* at 114:18-23.
[105] DX-29.
[106] Levy Dep. at 48:25-49:18.

Tvermoes.[107] Mr. Gingerich was the person identified as the product manager of Windstream's relationship with GeoResults.[108]

Mr. Levy did not testify at trial. The Plaintiffs lodged his deposition for consideration. In his deposition, Mr. Levy testified that both Mr. Tvermoes and Mr. Gingerich were involved in meetings on whether to potentially use Acxiom instead of GeoResults as a vendor:

> Q. Now these meetings that were going frequently that were at least biweekly about potentially moving from GeoResults to Acxiom, was Mr. Tvermoes involved in those meetings, once he was hired?
>
> A. Yes.
>
> Q. Was Mr. Gingerich involved in those meetings?
>
> A. Some of them.
>
> Q. How often would Mr. Gingerich have been involved?
>
> A. I don't know.
>
> Q. How often would Mr. Tvermoes have been involved, once he was hired?
>
> A. I'd say most of them.
>
> Q. Were they both privy to the information that you were privy to, with respect to the review of the Acxiom vendor versus GeoResults' vendor?
>
> A. Yes.
>
> Q. Your knowledge of this began sometime in September of 2015; correct?
>
> A. Yes.
>
> Q. Were they privy as early as September of 2015? Whenever Nicolai was hired. I get that.
>
> A. That's what I was about to clarify. So Stephen Gingerich, yes. Nicolai, when he was hired, assuming it wasn't prior to September. I just don't recall exactly when I brought him on.[109]

[107] Tr. Day 3 at 27.
[108] DX-452.
[109] Levy Dep. at 150:25-152:03.

Mr. Kenny testified that an executive named Sarah Day had joined Windstream.[110] Mr. Kenny believed that Ms. Day was "agitating for a switch" away from GeoResults.[111] Although Mr. Kenny testified at Trial that it was his "impression" that there was a "power struggle" between Mr. Levy and Ms. Day, with Ms. Day a proponent of a transition away from GeoResults.[112] The Court must discount Mr. Kenny's testimony some on this point for certain reasons—Mr. Kenny, as an employee of GeoResults, has no personal knowledge of any "power struggle," the testimony is unsupported by any other evidence, and Mr. Kenny testified that he had destroyed his contemporaneous notebooks.[113]

Mr. Levy testified that he only ever had a single discussion with Ms. Day about GeoResults.[114] Mr. Levy testified that, at the time, he was concerned with cost and potential efficiencies from moving to a single vendor for data.[115] Mr. Kenny was not overly concerned, however, because he considered himself to be a "trusted advisor" of Mr. Levy and the entire enterprise marketing organization at Windstream.[116]

In October 2015, Mr. Levy recognized that there were potential efficiencies to be gained from moving to a single source of data with an entity like Acxiom.[117] Mr. Levy was also interested in expanding Windstream's relationship with GeoResults.[118] Mr. Levy emailed Kenny on October 20, 2015 that he would like to discuss the GeoResults account.[119] Mr. Levy also

[110] Sarah Day was in the consumer/small business unit. *Id.* at 25:20-25:25.
[111] Tr. Day 2 PM at 84.
[112] *Id.* at 96-97, 113; *see also* Levy Dep. at 58-59.
[113] Tr. Day 3 at 22. The Court found Mr. Kenny's seemingly selective loss of contemporaneous notes odd and found that it impacted Mr. Kenny's credibility.
[114] Levy Dep. at 127:07-10.
[115] *Id.* at 60:23-61:08, 96:19-97:11.
[116] Tr. Day 2 PM at 23.
[117] Levy Depo. at 60:19-61:08.
[118] *Id.* at 109:23-110:07.
[119] DX-835.

stated that he wanted to set up a discussion between himself, Jackie Stringer—a procurement executive at Windstream—and Mr. Kenny.[120]

Mr. Levy testified that he wanted to discuss extending what he referred to as the "auto renewal provision."[121] Mr. Levy purportedly was "concerned that the contract would auto-renew during this period, when [Windstream was] trying to decide if [Windstream was] going to move forward with Acxiom or with GeoResults."[122] As presented at Trial, "[i]t was [Mr. Levy's] hope to gain an extension on that decision so that [he] would not be forced to terminate the contract with GeoResults prior to making a final decision on Acxiom."[123]

Prior to Mr. Levy's email, Mr. Kenny could not recall ever speaking to Mr. Levy and had not met Mr. Levy.[124] At trial, Mr. Kenny could not comment on Mr. Levy's request concerning an extension of the "auto-renewal provision."

> Q. Do you recall when he called you that he wanted to discuss an extension for the auto renewal Clause?
>
> A. I don't understand, we did not have an auto renewal clause, what does that mean?
>
> Q. I'm asking you, do you recall that; yes or no?
>
> A. No.
>
> Q. If he mentions that he wanted an extension of the auto renewal clause, do you know what I'm talking about?
>
> A. No.[125]

[120] *Id*.; Tr. Day 2 PM at 66.
[121] Levy Dep. at 65:03-65:07.
[122] *Id*. at 65:06-09.
[123] *Id*. at 65:09-13.
[124] Tr. Day 2 PM at 23, 65; Tr. Day 3 at 26, 46-47.
[125] Tr. Day 3 at 29.

Mr. Kenny was at a trade show when he received Mr. Levy's October email.[126] Mr. Shields and Mr. Fogle also attended the trade show.[127] Mr. Kenny, at that time, was communicating with Mr. Fogle in an effort to complete his employment contract with FlowShare before leaving for vacation on October 21, 2015.[128] Subsequently, Mr. Kenny spoke with Mr. Levy and Ms. Stringer on October 26, 2015 concerning the "auto-renewal provision."[129] This was the same day that Mr. Kenny ultimately signed his employment contract with FlowShare, which included a $100,000 incentive payment for renewal of the Windstream Agreement.[130]

During exchanges with Mr. Levy, Mr. Kenny had requested that Becky Cottingham (an attorney for GeoResults) review the Windstream Agreement and Windstream SOW4.[131] The evidentiary record is unclear as to when Mr. Kenny made this request, but Ms. Cottingham responded to Mr. Kenny's question shortly after the October 26, 2015 call between Mr. Kenny, Mr. Levy and Ms. Stringer.[132] Ms. Cottingham copied Mr. Shields on her response to Mr. Kenny.[133]

Mr. Shields discussed this email with Ms. Cottingham.[134] Mr. Shields testified that Ms. Cottingham told him that Mr. Kenny had asked her to check into the length and terms of the Windstream Agreement.[135] According to Mr. Shields and Ms. Cottingham, Mr. Kenny had told Ms. Cottingham that Windstream was confused about the terms of the contract and whether it was a one-year contract or a three-year contract.[136] At the Trial, Mr. Kenny provided that Ms.

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[126] DX-835.
[127] Tr. Day 2 PM at 62.
[128] Tr. Day 3 at 44-45.
[129] Levy Dep. at 68:18-69:24; Tr. Day 2 at 80-81.
[130] Tr. Day 3 at 24, 46; PX-165.
[131] PX-45.
[132] *Id*.
[133] *Id*.
[134] Tr. Day 4 at 160.
[135] *Id*.
[136] *Id.* at 160-161; Cottingham Dep. at 104:14-18.

Stringer, a Windstream employee, had been asking Mr. Kenny what his contractual interpretation was of the Windstream Agreement.[137]

Mr. Shields reached out to Mr. Kenny by email and asked what was going on with Windstream.[138] Mr. Shields testified about his exchange with Mr. Kenny.

Q. Let's take the first sentence.

A. Okay.

Q. What were you trying to communicate to Mr. Kenny at this point?

A. That I was surprised that there was something going on at Windstream that I hadn't heard anything about.

Q. You knew from Mr. Kenny's earlier conversation there was competition from D&B, right?

A. I knew it back on the first of October and so it was D&B, that he just mentioned causally that they were sniffing around the account, that's all I knew.

Q. And you hadn't heard anything since October 1st to this e-mail?

A. No, I heard nothing in between, this was a surprise.[139]

Mr. Kenny called Mr. Shields and informed him that the competition was not directly with D&B, but rather that D&B was partnering with Acxiom.[140] Mr. Kenny also mentioned "a D&B zealot is in the account, he's looking to purchase D&B data."[141] Mr. Shields told Mr. Kenny that this made no sense because Windstream was already buying D&B data.[142] Mr. Shields instructed Mr. Kenny to go and educate Windstream about the databases and products

[137] Tr. Day 4 at 67.
[138] DX-107.
[139] Tr. Day 4 at 162.
[140] *Id.* at 163-164.
[141] *Id.* at 164.
[142] *Id.* at 165.

they were buying.[143] Mr. Shields testified that Mr. Kenny never suggested that Windstream was considering terminating the account:

> Q. During this conversation did Mr. Kenny say to you in words or substance that he was going down to Windstream to, quote, "salvage the account" unquote?
>
> A. No, he did not. I suggested that he get down there and visit the people that were there, whoever these people are, and educate them on what we've got. They obviously don't know who we are.
>
> Q. And did you use the term "salvage the account"?
>
> A. No, I did not. This was so early, this is the first I'd heard about it, it's time to go compete.[144]

Mr. Kenny agreed to visit Windstream, but failed to mention to Mr. Shields that Mr. Levy had requested an extension of the auto-renewal provision.[145]

Mr. Kenny then planned a trip to Windstream.[146] Mr. Kenny contacted Jeff Brown, an employee at Windstream, on November 2, 2015, regarding additional products that had been requested.[147] On November 4 and November 5, 2015, Mr. Kenny forwarded a PowerPoint presentation to Windstream for distribution and use at his upcoming meeting.[148]

Mr. Kenny did not recall any conversation of substance with Mr. Levy between the October 26, 2015 call and the meeting with Windstream, nor setting up the meeting in Little Rock, Arkansas.[149] Mr. Kenney did have a discussion with Mr. Levy on October 28, 2015 to discuss potentially going to Charlotte, N.C. to give a presentation on GeoResults' products, as well as the additional data that Mr. Levy was requesting.[150] On October 30, 2015, Mr. Levy then

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[143] *Id*.
[144] *Id*. at 168.
[145] Tr. Day 3 at 52.
[146] *Id*. at 52-54, 66-68.
[147] DX-619.
[148] PX-139/DX-616.
[149] *Id*.
[150] DX-616 at 2; Tr. Day 3 at 65-66.

provided additional information concerning the products that were under review by Windstream.[151]

Mr. Shields and Mr. Kenny had a discussion on October 30, 2015 as Mr. Kenny was preparing to go to Little Rock.[152] It does not appear there was any mention of potential termination of the Windstream Agreement, only discussion concerning the substance of Mr. Kenny's presentation to Windstream.[153]

Mr. Kenny then visited Windstream on November 6, 2015.[154] This is the same date as the effective date of the APA.[155]

Mr. Kenny was also in communication with Mr. Fogle about the ongoing due diligence process.[156] Due to the potential sale of GeoResults through the APA, Mr. Kenny provided Mr. Fogle with contact information for GeoResults' customers.[157] Through November 2, 2015, Mr. Kenny was discussing contacting customers and obtaining renewals with Mr. Fogle, without including Mr. Shields.[158]

Mr. Fogle had a conference call with Mr. and Mrs. Shields on November 3, 2015, as well as a second, follow-up telephone conversation with Mr. Shields,[159] concerning contacting GeoResults' customers.[160] During those conversations, Mr. Shields advised Mr. Fogle that Mr. Kenny was traveling to Little Rock to meet with Windstream and reiterated that there was

[151] DX-616.
[152] Tr. Day 4 at 168-169.
[153] *Id*.
[154] *Id*.
[155] PX-1/DX-508.
[156] DX-421; Tr. Day 3 at 57.
[157] *Id*.
[158] DX-421; Tr. Day 3 at 35, 59-62.
[159] Tr. Day 4 at 170-171; Tr. Day5 at 82-83.
[160] Tr. Day 2 AM at 9; Tr. Day 4 PM at 170-173; Tr. Day 5 AM at 27.

competition for the account.[161] Mr. Fogle appeared to understand Mr. and Mrs. Shields' concerns about unsettling customers with news of an impending sale.[162]

On November 4, 2015, Mr. Shields notified Mr. Fogle—this time via email—that Mr. Kenny should be on any call with Windstream.[163] Mr. Shields testified that he did not want Trevoir Gregg, a representative of RLJ (FlowShare's lender), to be on the call.[164] According to Mr. Shields, Mr. Gregg had been on a previous customer call to CenturyLink where the customer had been "stirred up" and Mr. Kenny had to step in to calm them down.[165] Mr. Shields testified as follows:

> A. I meant exactly what I just said, they are going to mess this account up by going in there and calling them.
>
> Q. Why did you say "at this time"?
>
> A. Because of the renewal process is going on and the competition in the account, it's due to the competition.
>
> Q. Can you read your next sentence?
>
> A. Yes, "D&B is hot after this account."
>
> Q. What did you mean by that?
>
> A. D&B was competing for this account and that they had a zealot in there and that they are actively participating in this account.
>
> Q. Why did you only mention D&B?
>
> A. Because they are the big dog, they are the ones to be worried about. Acxiom was not a big business database player, they didn't understand telecom at all, so D&B was the real power behind the throne.[166]

[161] Tr. Day 2 AM at 9; Tr. Day 4 PM at 170-173; Tr. Day 5 AM at 27, 82-83.
[162] Tr. Day1 at 153-157.
[163] DX-108.
[164] Tr. Day 4 at 176-177.
[165] *Id*.
[166] *Id.* at 178-179.

Mr. Fogle testified that he understood the source of Mr. Shields' concern was competition in the account.[167]

Mr. Fogle called Windstream anyway.[168] Mr. Fogle seemed confident of Windstream's continuing commitment to SOW4 because he was certain that Windstream could only source critical telecom data from either GeoResults or ShareTracker.[169] Mr. Fogle testified that:

> . . . the most critical component of the data being delivered to Windstream is the telecom append process, so if they are not going to get that from GeoResults they would have to get that from an alternative. D&B often worked with TNS, TNS bought that data from ShareTracker. So if there was a serious threat there I would have expected a contract or a proposal or some pricing discussion ordered and brought in on an evaluation of that data with Windstream from my relationships with TNS and with Dun & Bradstreet.[170]

Mr. Fogle provided that GeoResults' unique offering of telecom data was a significant reason behind FlowShare's interest in acquiring GeoResults.[171] Mr. Fogle stated that:

> [p]art of our interest and attraction in this company, in particular, was their history, the 15 years of history and expertise to be able to accurately do that. There's only two companies I was aware of that had that kind of expertise. One was GeoResults, the other was ShareTracker, my company, similarly, through many years of history and building the expertise. So I felt comfortable that for [Windstream] to move away from GeoResults they would have to get the telecom append data from the only other source out there and that would be us.[172]

Mr. Fogle was optimistic that Windstream's business operations were dependent on these business databases appended with the unique telecom data.[173] Mr. Fogle believed that Windstream would have to interrupt their business operations in order to make any change in vendors—making any real "threat" to the account improbable.[174] Mr. Fogle testified that "the

[167] Tr. Day 2 AM at 6.
[168] Tr. Day 1 at 162-163.
[169] *Id*.
[170] *Id*. at 162-163.
[171] *Id*. at 127-128.
[172] *Id*.
[173] *Id*. at 140-141.
[174] *Id*.

only other source we were aware of that could provide that underlying telecom data was ShareTracker."[175]

Mr. Fogle had a call with Windstream on or about November 4, 2015.[176] Mr. Fogle did not include Mr. Kenny on the call.[177] Mr. Gingerich and Mr. Tvermoes—the Windstream executives who had been in constant communication with Mr. Levy—were on the call. Following the call, Mr. Fogle sent an email to Mr. Shields and Mr. Kenny.[178] The email summarizes the call and provides:

> **From:** Eric Fogle [mailto:efogle@sharetracker.net]
> **Sent:** Wednesday, November 04, 2015 4:40 PM
> **To:** Ted.Shields@GeoResults.com
> **Cc:** Jim Kenny
> **Subject:** RE: Windstream
>
> Ted and Jim,
>
> The call went VERY, VERY well. Only Steve and Nicolai on the call, they were both very supportive. Indicated that they are in the first year of a three year contract, with no intentions of making any changes.
>
> I shared with them our ability and interest in adding broadband provider to your data (as the reason for our interest in developing a partnership), and they agreed that would be very interesting. The only issue/concern that they offered up about your data was the quality of the contact information at the individual business level. They also admitted that they were not aware of any better options. I offered that by working together with you to add in our broadband information at the individual business level, that could help improve upon the quality by measuring both voice provider (as you do today) and the current broadband provider (which we bring in).
>
> Unless someone else calls me back, I do not expect any additional customer calls (I am not initiating any more). This deal is getting done.
>
> Eric
>
> Eric Fogle
> President
> 573-657-2140 (office)
> 573-808-3453 (cell)

Upon receipt of Mr. Fogle's email, Mr. Shields emailed Mr. Kenny, trying to determine whether Mr. Kenny had been on the call with Windstream and if Mr. Kenny had any additional

[175] *Id.* at 141.
[176] PX-54/DX-423.
[177] *Id.*
[178] *Id.*

information about the call.[179] Mr. Kenny did not respond to Mr. Shields' request concerning the Windstream call.[180] In addition, Mr. Kenny did not express concerns, if any, with Windstream to Mr. Fogle.[181] Mr. Kenny testified that he did not recall receiving Mr. Shields' email, contending that he saw it for the first time at his deposition.[182] Mr. Fogle repeated the same information contained in the prior email in a later call with Mr. and Mrs. Shields.[183] He expressed that "I sure wish my customers loved me as much as yours love you."[184]

On November 6, 2015, Mr. Fogle contacted his lender with more information about Windstream.[185] Mr. Fogle reported that Windstream had confirmed that they were at the end of the first year of a three-year contract and that they would be interested in broadband data being added to their existing fees.[186] Mr. Fogle conveyed that, "[t]hey would not have spent the additional time sharing their needs, and discussing these opportunities if they weren't willing to continue to do business with us going forward."[187] As noted above, the parties also closed on the sale of GeoResults on November 6, 2015.[188]

Mr. Fogle's statements to his lender were consistent with Mr. Kenny's emails from the same period.[189] Mr. Kenny did not transmit any emails or other correspondence that indicated a possible cancellation of the Windstream Agreement.[190]

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[179] DX-423; DX-424.
[180] Tr. Day 1 at 303; Tr. Day 3 at 63-65; Tr. Day 4 at 185.
[181] *Id*.
[182] Tr. Day 3 at 63-64.
[183] Tr. Day 4 at 184-185.
[184] *Id.* at 184.
[185] DX-801.
[186] *Id.*
[187] *Id.*
[188] Tr. Day 5 AM at 56.
[189] Although Mr. Kenny testified that he kept notebooks during this time, he testified that he destroyed them. Tr. Day 3 at 22.
[190] PX-139; Tr. Day 3 at 70-71.

Mr. Kenny testified that he believed had met two objectives outlined for the trip to Windstream: (i) educating Windstream on the products they were currently receiving and (ii) showing Windstream additional products they could buy.[191] Mr. Shields testified:

> A. Jim Kenny called me after his presentation to Windstream from the Little Rock airport.
>
> Q. What was Mr. Kenny calling you for?
>
> A. To give me an update on how the presentation went.
>
> Q. And did Mr. Kenny provide any details about the discussions he had had with the Windstream folks at that meeting?
>
> A. Yes, he did.
>
> Q. What did he say?
>
> A. He said that it was a very good presentation, that they were blown away by our products and services. They didn't know we had done all the free work for Windstream. They were energized, they gave me some additional work to do to get Linkage file in and sharpen the pencil a bit, but he was coming out of there with a new proposal to make.
>
> Q. Did Mr. Kenny ever tell you that he thought the meeting was a mere formality?
>
> A. No, he didn't.
>
> Q. Did he ever tell you that on that call that he thought the meeting was a waste of time?
>
> A. No, he didn't.
>
> Q. Did he ever say anything to you to suggest that Windstream had already made up its mind to do something other than stay with GeoResults?
>
> A. No, he did not, quite the opposite.
>
> Q Did he say anything to suggest that Windstream was considering terminating its relationship?

[191] Tr. Day 3 at 72-73.

A. Nothing at all. He was very energized by that meeting and in that call to me he was very happy.

Q. Did he say anything about Scope of Work No. 4 being DOA?

A. No, he did not.[192]

Mr. Kenny and Mr. Shields had this call at a time after closing on the APA.[193]

Following this call, Mr. Kenny testified that he did not recall any further communications with either Mr. Shields or Mr. Fogle prior to November 30, 2015.[194] The evidence adduced at Trial showed that Mr. Kenny was actively contacting Windstream about providing additional services.[195] Mr. Levy also confirmed that Windstream had been requesting additional data.[196]

Following the November 6, 2015 closing, Mr. Kenny continued the process of getting the necessary information to potentially expand the Windstream relationship, including an email on November 7, 2015 from Mr. Levy to Mr. Kenny asking for pricing on Legal Linkage information.[197] On November 11, 2015, Mr. Kenny contacted D&B concerning adding Legal Linkage, the additional data for which Windstream had requested pricing information.[198] On November 20, 2015, Mr. Kenny wrote Mr. Fogle—who was now his boss—about D&B resisting him on the Legal Linkage data, indicating that "Windstream wants to understand the price so they can make a decision and include it in their 2016 budget requirements or not."[199]

[192] Tr. Day 4 at 187-188.
[193] *Id.* at 189.
[194] Tr. Day 3 at 71-72.
[195] DX-633.
[196] Levy Dep. at 108:12-110:07; 132:10-132:20.
[197] DX-633, Tr. Day 3 at 80-81.
[198] DX-41; Tr. Day 2 AM at 38.
[199] DX-720.

4. Windstream Termination Notice

On November 30, 2015, Windstream sent its notice of termination of the Windstream Agreement.[200] Mr. Shields emailed Mr. Kenny, asking: "Jim, this does not look good. Were you aware of this development?"[201] Mr. Kenny did not immediately respond to Mr. Shields. Instead, Mr. Kenny sent an email to Mr. Fogle, and reported:

> I flew down to Little Rock on November 6th to meet with a number of Windstream executives including Geoff and Nicolai. The purpose was to take them through a detailed discussion of the database products that they are currently getting from GeoResults and then discuss what new requirements they had and how GeoResults could best address them. I believe that the meeting was successful. It opened the eyes of these new executives to the major benefits that we bring to the table with our comprehensive and hygiened multi-sourced business and telecom database when compared to the raw single sourced D&B business file.
>
> * * *
>
> Because our 3 Year Contract with Windstream has a termination for convenience clause that requires a 30 day notice, Geoff said that he was forced to send us a Notice to Terminate letter today in order to keep his options open on how to proceed.[202]

To the Court, this email indicates that Mr. Kenny seemed to believe that no final decision had been made, and there was still a chance Windstream would rescind the termination. Mr. Kenny states that he had spoken to Mr. Levy, who indicated that "he needs to make a final decision no later than December 15th."[203] At his deposition, Mr. Levy did not recall the exact date of this conversation but provided that his recollection is consistent with Mr. Kenny's recollection that Windstream had not yet made a final decision as to the Windstream Agreement.[204]

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[200] DX-24.
[201] DX-101.
[202] PX-169/DX-103.
[203] *Id.*; Tr. Day 3 at 10.
[204] Levy Dep. at 136:11-137:06, 137:20-137:24.

Mr. Kenny responded to Mr. Shields' November 30, 2015 email on December 3, 2015. In his responsive email, Mr. Kenny contended that Mr. Shields knew Windstream was cancelling SOW4.[205] Mr. Kenny's email came after Mr. Kenny had discussed the Windstream situation with Mr. Fogle.[206]

At Trial, Mr. Shields testified that he never knew that Windstream intended to terminate:

> Q. And how would you respond to an assertion that you had knowledge on or before November 6, 2015, that Windstream intended to terminated its relationship with GeoResults?
>
> A. It's baseless.[207]

Mr. Shields also testified that he wanted to respond to Mr. Kenny to set the record straight but Mr. Fogle "told me not to bother."[208] Mr. Fogle told Mr. Shields to focus on what was needed to "win this account" and that everything else was "water under the bridge right now."[209]

As of December 10, 2015, Mr. Fogle and Mr. Shields were exchanging text messages about a meeting in Charlotte with Mr. Levy regarding the Windstream account.[210] Mr. Fogle stated that the meeting "went generally good, it was worth the trip down there" but that we "are not out of the woods yet though."[211] On December 24, 2015, Mr. Fogle sent an e-mail to Mr. and Mrs. Shields concerning the current status at the company.[212] Mr. Fogle expressed that he was "still very happy with the acquisition."[213] Mr. Fogle also expressed that he and Mr. Kenny

[205] DX-42.
[206] Tr. Day 3 at 18.
[207] Tr. Day 4 at 128; *see also id.* at 213-214.
[208] Tr. Day 2 AM at 57-58; Tr. Day 4 at 217.
[209] DX-50.
[210] DX-4 at 9.
[211] *Id.*
[212] DX-460.
[213] *Id.*

were "lobbing hail mary's this week to try and save Windstream, but it does not look good."[214] Then on December 31, 2015, Mr. Fogle wrote in an e-mail to Mr. Verkamp, Mr. Shields and Mrs. Shields:

> As far as the latest, we have managed to push the final decision into next week, and several [W]indstream folks have been weighing in on our behalf. [Mr. Kenny] and I are talking again this morning about the latest steps/moves in this chess game. So, we aren't dead yet, but we should continue to be making plans for the very real possibility that Windstream does not renew (at least with respect to the impact on cashflow in January).[215]

The Court, as factfinder, finds that the record demonstrates that *none* of the parties to this civil proceeding knew—to any degree of certainty—that Windstream had made the decision to send a notice of termination prior to November 30, 2015. The Court finds that GeoResults—including Mr. Shields and Mrs. Shields—did not fail to provide notice, under the APA, that: (i) any Assumed Contract or Permit had been accelerated, terminated or been cancelled; (ii) any party intended to terminate, modify or accelerate any Material Contract; or (iii) any Material Customer intended to stop, decrease the purchase of services or cease doing business with GeoResults.

5. Post-Closing Actions

FlowShare/ShareTracker was experiencing cash flow issues.[216] Mr. Shields, Mrs. Shields and Mr. Fogle began having monthly calls to address these issues.[217] On these calls, Mr. Fogle continued to assure Mr. Shields and Mrs. Shields that the Shortfall Agreement would be honored; however, Mr. and Mrs. Shields, at Mr. Fogle's request, agreed to forego their salary in

[214] *Id.*
[215] DX-48.
[216] Tr. Day 2 AM at 64-66; Tr. Day 3 at 191-194; DX-775.
[217] Tr. Day 4 at 223, 233.

order to help alleviate FlowShare's issues.[218] FlowShare was also having trouble paying vendors[219] and lost additional customers, including Lightower/Fibertech and XO.[220]

Faced with financial issues and threats of default,[221] it appears that Mr. Fogle examined whether there had been a breach under the APA and if he should make a claim on the Escrow. In a February 5, 2016 email forwarded by M. Fogle to Mr. Verkamp, Mr. Fogle wrote: "FYI, backup info for Windstream escrow."[222] Mr. Verkamp testified that he was also discussing with Mr. Fogle in February whether to submit a claim against the escrow in connection with the loss of Windstream.[223]

On February 10, 2016, Mr. Fogle suggested that Mr. Shields had withheld information concerning the Windstream account.[224] Mrs. Shields replied to the message, expressing her surprise and explaining her understanding of what had occurred.[225] On February 16, 2016, Mr. Shields, Mrs. Shields and Mr. Fogle then participated in a conference call.[226] During the conference call, Mr. Fogle seemed to backtrack and attributed any misunderstanding on the issue of Windstream to Mr. Gregg.[227] Mr. Fogle also explained that he had discovered TNS had stolen some GeoResults data and had been using it to win the Windstream account.[228] According to Mr. Fogle, this fact should have been discovered through due diligence.[229]

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[218] DX-398.
[219] DX-61; DX-775.
[220] Tr. Day 2 AM at 61-64; DX-733.
[221] Mr. Verkamp testified that RLJ had previously informed FlowShare that it was in default of its loan obligations, but he could not remember the exact date. Tr. Day 3 at 176.
[222] DX-846.
[223] Tr. Day 3 at 202-203.
[224] DX-110.
[225] *Id.*
[226] Tr. Day 4 at 227.
[227] *Id*.
[228] *Id.*
[229] *Id.* at 227-228.

Soon after, FlowShare filed a lawsuit against TNS for the alleged theft of GeoResults' data.[230] That lawsuit alleged that TNS was the reason behind why an unnamed customer—i.e., Windstream—terminated its contract.[231] Mr. Fogle stated that: "I believe TNS's conduct in theft of our trade secrets contributed to [Windstream's] decision, yes."[232]

On March 25, 2016, Mr. Shields, Mrs. Shields and Mr. Fogle engaged in another conference call. [233] On that call, Mr. Fogle mentioned that TNS had stolen GeoResults' data.[234] Mr. Fogle also revealed that FlowShare was working on a deal with TNS in an attempt to move forward.[235] Later, on a conference call in late May, Mr. Fogle again reported that TNS had stolen data or was still using the previously stolen data in order to secure several other accounts.[236] Mr. Fogle reiterated that TNS was responsible for the loss of the Windstream account and indicated that TNS had handed him a "multi-million dollar lawsuit."[237]

Mr. Shields and Mrs. Shields remained in contact with Mr. Fogle, who continued to promise to pay them under the Shortfall Agreement.[238] In April, Mr. Fogle explained that there were a number of reasons for the ongoing cash flow issues at FlowShare, including: (1) Direct TV and Windstream had not renewed; (2) Verizon Wireless' reorganization; (3) Comcast Master Services Agreement being slow to execute; and (4) TNS not paying due to the ongoing legal dispute.[239] The Court notes that Direct TV, Verizon Wireless, Comcast, and TNS were all previously customers of FlowShare/ShareTracker and not customers of GeoResults.[240]

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[230] DX-888 (dated Mar. 4, 2016); Tr. Day 2 AM at 76.
[231] DX-888; Tr. Day 2 AM at 78-80.
[232] Tr. Day 2 AM at 82.
[233] Tr. Day 4 at 230.
[234] *Id*.
[235] *Id.* at 230-231.
[236] *Id*. at 231-232.
[237] *Id.* at 232.
[238] DX-399; Tr. Day 4 at 229-230.
[239] DX-399; Tr. Day 2 AM at 68-69.
[240] Tr. Day 5 AM at 71-72.

In July 2016, Mr. Shields, Mrs. Shields and Mr. Fogle convened a conference call to discuss the unpaid salaries of Mr. Shields and Mrs. Shields.[241] When discussing the Escrow, Mr. Fogle restated many of the reasons why Mr. Shields and Mrs. Shields were not responsible for the loss of the Windstream account. Mr. Shields testified as follows:

> Q. What was the discussion in July?
>
> A. It was a discussion about salary not being paid yet, so that started it. And we talked about the escrow and we talked about Windstream and Mr. Fogle said as far as that goes, the customer told you and me that on November 4th you are not going anywhere, he said that Jim was not as well positioned in the account as he should have been and he said you had no visibility to any internal power struggle at Windstream and that it was not a reps and warranties issue, those were his words.[242]

Mr. Fogle confirmed these statements in a later August call:

> Q. And what happened in August?
>
> A. We started first about not getting paid and then we spoke of Windstream. He reiterated basically the January call again and then he said to Dawn, she was asking about the escrow payment and he said as far as the escrow goes, it's a hundred percent guaranteed, those are his exact words that he said, and that the Shortfall will be delayed until 2016.[243]

After the TNS lawsuit was filed, Mr. Fogle does not appear to have accused anyone of withholding any information or breaching any representation or warranty under the APA.[244] The record indicates that it was not until September 2016 that Mr. Fogle began to seriously contemplate making an actual claim against the Escrow in an effort to offset FlowShare/ShareTracker's mounting losses and raise funds for a new venture.[245] Even then, he was reluctant and listed several other potential sources to find cash, including (i) a potential

[241] Tr. Day 4 at 233.
[242] *Id*. at 233-234.
[243] *Id*.
[244] Tr. Day 2 AM at 98.
[245] DX-395.

refinancing; (ii) an increase in letters of credit; (iii) delaying vendor payments; (iv) delaying other payments; (v) settle the TNS lawsuit; and (vi) make a claim against the Escrow.[246] Mr. Fogle noted that making a claim against the Escrow was not his preference.[247]

FlowShare actually submitted a claim against the Escrow in October 2016.[248] The claim notice identifies a claim worth $1.5 million—even though that amount is actually higher than the total lost revenue under SOW4.[249] On the same day the claim notice was sent, however, Mr. Verkamp was actually preparing to disburse the escrow monies. [250] Mr. Verkamp wrote: "[o]n the escrow, as long as your account has not changed, you should be good to go."[251]

When Mr. and Mrs. Shields rejected FlowShare's claim notice, this litigation ensued. For the first time, Mr. Fogle also took the position that the Shortfall Agreement was unenforceable and that he had no obligation to pay Mr. and Mrs. Shields anything pursuant to that agreement. Mr. Fogle's refusal to honor his obligations under the Shortfall Agreement was consistent with his pre-acquisition strategy.[252]

IV. GENERAL LEGAL PRINCIPLES

The Court will be applying the following general legal principles:

A. BURDEN OF PROOF BY A PREPONDERANCE OF THE EVIDENCE[253]

In a civil case, the burden of proof is by a preponderance of the evidence. Proof by a preponderance of the evidence means proof that something is more likely than not. This means that certain evidence, when compared to the evidence opposed to it, has the more convincing

[246] *Id*.
[247] *Id*.
[248] DX-392.
[249] *Id*.
[250] DX-416.
[251] *Id*.
[252] DX-725.
[253] Taken from Superior Court Civil Pattern Jury Instruction 4.1.

force and makes the Court believe that something is more likely true than not. If the evidence on any particular point is evenly balanced, the party having the burden of proof has not proved that point by a preponderance of the evidence, and the Court must find against the party on that point.

In deciding whether any fact has been proved by a preponderance of the evidence, the Court may consider the testimony of all witnesses regardless of who called them, and all exhibits received into evidence regardless of who produced them.

In this particular case, Plaintiffs carry the burden of proof by a preponderance of the evidence on Counts I and II, and Defendants on Counterclaims I and II.[254]

B. EVIDENCE—DIRECT OR CIRCUMSTANTIAL[255]

Generally speaking, there are two types of evidence from which the fact-finder may properly find the facts. One is direct evidence—such as the testimony of an eyewitness. The other is indirect or circumstantial evidence—circumstances pointing to certain facts.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the Court find the facts from all the evidence in the case: both direct and circumstantial.

C. EVIDENCE EQUALLY BALANCED[256]

If the evidence tends equally to suggest two inconsistent views, neither has been established. That is, where the evidence shows that one or two things may have caused the breach/damages: one for which a party was responsible and one for which a party was not. The Court cannot find for the party carrying the burden of proof if it is just as likely that the breach/damages was caused by one thing as by the other.

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[254] *See, e.g.*, *Reynolds v. Reynolds*, 237 A.2d 708, 711 (Del. 1967) (defining preponderance of the evidence); *Oberly v. Howard Hughes Medical Inst.*, 472 A.2d 366, 390 (Del. Ch, 1984) (same).
[255] Taken from Superior Court Civil Pattern Jury Instruction 23.1.
[256] Taken from Superior Court Civil Pattern Jury Instruction 4.2.

D. EXPERT TESTIMONY[257]

The parties presented expert witnesses during the course of the Trial. Expert testimony is testimony from a person who has a special skill or knowledge in some science, profession, or business. This skill or knowledge is not common to the average person but has been acquired by the expert through special study or experience.

In weighing expert testimony, the Court may consider the expert's qualifications, the reasons for the expert's opinions, and the reliability of the information supporting the expert's opinions, as well as the factors previously mentioned for weighing the testimony of any other witness. Expert testimony should receive whatever weight and credit the Court thinks is appropriate, given all the other evidence in the case.

The Plaintiffs used Mr. King as their expert witness on damages. The Defendants presented Mr. Stephens as their damages expert. The Court found both Mr. King and Mr. Stephens to be credible witnesses. Given the holdings below, the Court found the testimony of Mr. Stephens and Mrs. Shields to be the most relevant on damages.

E. CREDIBILITY OF WITNESSES—WEIGHING CONFLICTING TESTIMONY[258]

Here, the Court is the sole judge of each witness's credibility. That includes the parties. The Court considers each witness's means of knowledge; strength of memory; opportunity to observe; how reasonable or unreasonable the testimony is; whether it is consistent or inconsistent; whether it has been contradicted; the witness's biases, prejudices, or interests; the witness's manner or demeanor on the witness stand; and all circumstances that, according to the evidence, could affect the credibility of the testimony.

[257] Taken from Superior Court Civil Pattern Jury Instruction 23.10.
[258] Taken from Superior Court Civil Pattern Jury Instruction 23.9.

If the Court finds the testimony to be contradictory, the Court may try to reconcile it, if reasonably possible, so as to make one harmonious story of it all. But if the Court cannot do this, then it is the Court's duty and privilege to believe the testimony that, in the Court's judgment, is most believable and disregard any testimony that, in the Court's judgment, is not believable.

The Court, as the fact-finder, wants to make some general observations about credibility as it relates to the ultimate verdict. The Court found the following fact witnesses to be credible—Mr. Shields, Mrs. Shields and, to some limited extent, Mr. Verkamp. The Court found Mrs. Shields to be an especially credible and impressive witness. Mrs. Shields is a very competent businesswoman and ethical, never shying from or evading a hard question. Mrs. Shields' testimony was straightforward, responsive and supported by other evidence (testimonial and documentary) admitted in this case. The Court found her testimony to be especially helpful in arriving at its verdicts.

The Court found Mr. Verkamp to be a straightforward witness at Trial. At Trial, Mr. Verkamp testified in a manner consistent with the evidence. However, the Court must discount Mr. Verkamp's credibility due to his less than honest dealings with Mr. and Mrs. Shields during the period of time relevant to the claims asserted in this civil proceeding.

The Court found Mr. Kenny to be a less credible witness. Mr. Kenny comes across as overly biased. Moreover, the Court found Mr. Kenny's Trial testimony to be inconsistent with the documentary evidence. As noted above, the fact that Mr. Kenny destroyed or lost contemporaneous notes diminishes his credibility as a fact witness.

Finally, as to fact witnesses, the Court finds Mr. Fogle not to be a credible witness. Mr. Fogle operated in an unethical way with Mr. and Mrs. Shields, the GeoResults transaction, including the Shortfall Agreement, and in his dealings with Mr. Verkamp. Mr. Fogle

manipulated the situation so that he could close on the purchase of GeoResults and, when the business faltered, tried to place the blame of its failure on Mr. and Mrs. Shields.

V. HOLDING

The Court issued the Summary Judgment Opinion on March 25, 2019, holding that the Shortfall Agreement was enforceable. As to the Shortfall Agreement, the Court held that the only remaining issue was the amount of damages owed to Mr. and Mrs. Shields.[259] The Court also granted summary judgment against Plaintiffs on Count III (fraudulent inducement) of their Amended Complaint. The Court found that triable issues remained as to all other claims and counterclaims.

A. THE COURT FINDS AGAINST PLAINTIFFS ON AMENDED COMPLAINT COUNTS I AND II.

Under Delaware law, to prove a breach of contract claim, a party must show: "(1) a contractual obligation; (2) a breach of that obligation; and (3) resulting damages."[260] A party harmed by a breach of contract is entitled to compensation that will place that party in the same position that the party would have been in if the other party had performed under the contract.[261]

In Counts I and II of the Amended Complaint, Plaintiffs seek damages and declaratory relief for breach of the APA and related documents. In Count I, Plaintiffs contend that Defendants breached APA Sections 4.05, 4.11 and 4.20 by failing to inform FlowShare, prior to closing, that Windstream either (i) advised GeoResults (or Mr. and Mrs. Shields) that it intended to terminate the Windstream Agreement or (ii) provided notice of termination of the Windstream Agreement. Count II seeks a declaration that FlowShare is entitled to indemnification under APA Section 8.2 because GeoResults (or Mr. and Mrs. Shields) breached the APA.

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[259] Count IV of the Amended Complaint and Defendants' Counterclaim II. As Counterclaims III and IV were plead in the alternative to Counterclaim II, the Court will not address them in this Decision after Trial.
[260] *Interim Healthcare, Inc. v. Spherion Corp.*, 884 A.2d 513, 548 (Del. Super. 2005).
[261] *See E.I. DuPont de Nemours and Co. v. Pressman*, 679 A.2d 436, 445-46 (Del. 1996).

The Court finds that, under the APA, Windstream constitutes a "Material Customer" and that the Windstream Agreement is a "Material Contract."[262] The factual question is whether Defendants knew or should have known that Windstream intended to terminate the Windstream Agreement or delay the rate of purchasing products from GeoResults prior to the Effective Date of the APA. As stated above, the Court, as factfinder, finds that the record demonstrates that *none* of the parties to this civil proceeding knew—to any degree of certainty—that Windstream had made the decision to send a notice of termination prior to November 30, 2015. The Court finds that GeoResults, including Mr. Shields and Mrs. Shields, did not fail to provide notice, under the APA, that: (i) the Windstream Agreement or Windstream SOW4 had been accelerated, terminated or been cancelled; (ii) Windstream intended to terminate, modify or accelerate the Windstream Agreement or Windstream SOW4; or (iii) Windstream intended to stop, decrease the purchase of services or cease doing business with GeoResults.

Windstream did not send its notice of termination until November 30, 2015. Prior to that time, activity swirled around Windstream and its relationship with GeoResults but—according to witnesses—this was not unusual in the third and fourth quarters when dates of renewals approached. Contemporaneous evidence does not support the claim that anyone knew that Windstream would terminate its relationship with GeoResults. In fact, in an email that Mr. Fogle sent to Mr. Shields on November 4, 2015, Mr. Fogle told Mr. Shields that Windstream executives indicated that Windstream was in the first of a three-year agreement and had no intention of "making any changes."[263] Mr. Kenny was copied on the email and did not respond

[262] The facts cited in this subsection are not exhaustive. Section III lists all the facts found and relied upon by the Court in rendering its holdings on Counts I and II and Counterclaims I, II and IV.
[263] PX-54/DX-423.

to the email with any contrary view. Moreover, Mr. Kenny did not transmit any emails or other correspondence that indicated a possible cancellation of the Windstream Agreement.

Mr. Kenny met with Windstream on November 6, 2015. Windstream did not provide notice of termination on that date. Mr. Kenny called Mr. Shields afterwards. The evidence adduced at Trial showed that Mr. Kenny was actively contacting Windstream about providing additional services. Mr. Levy, a Windstream executive, also confirmed that Windstream had been requesting additional data.

Following the November 6, 2015 closing, Mr. Kenny continued the process of getting the necessary information to potentially expand the Windstream relationship, including an email on November 7, 2015 from Mr. Levy to Mr. Kenny asking for pricing on Legal Linkage information. On November 11, 2015, Mr. Kenny contacted D&B concerning adding Legal Linkage, the additional data for which Windstream had requested pricing information. On November 20, 2015, Mr. Kenny wrote Mr. Fogle—who was now his boss—about D&B resisting him on the Legal Linkage data, indicating that "Windstream wants to understand the price so they can make a decision and include it in their 2016 budget requirements or not."[264]

Plaintiffs contend that Mr. Kenny expressed different views to Mr. Shields regarding Windstream. The Court discounts Mr. Kenny's accounts of events based on the evidence adduced at trial.

After Windstream sent its notice of termination, Mr. Shields emailed Mr. Kenny, asking: "Jim, this does not look good. Were you aware of this development?"[265] This email was sent on November 30, 2015. Mr. Kenny did not immediately respond to Mr. Shields. Instead, Mr. Kenny sent an email to Mr. Fogle, and reported:

[264] DX-720.
[265] DX-101.

> I flew down to Little Rock on November 6th to meet with a number of Windstream executives including Geoff and Nicolai. The purpose was to take them through a detailed discussion of the database products that they are currently getting from GeoResults and then discuss what new requirements they had and how GeoResults could best address them. I believe that the meeting was successful. It opened the eyes of these new executives to the major benefits that we bring to the table with our comprehensive and hygiened multi-sourced business and telecom database when compared to the raw single sourced D&B business file.
>
> * * *
>
> Because our 3 Year Contract with Windstream has a termination for convenience clause that requires a 30 day notice, Geoff said that he was forced to send us a Notice to Terminate letter today in order to keep his options open on how to proceed.[266]

The Court finds that this email indicates that Mr. Kenny, on November 30, 2015, seemed to believe that no prior decision or final decision had been made by Windstream. Moreover, Mr. Kenny's email makes no mention that Mr. Shields or GeoResults knew, prior to the Effective Date, that Windstream intended to alter its agreements with GeoResults. Only after communicating with Mr. Fogle did Mr. Kenny respond to Mr. Shields. On December 3, 2015, Mr. Kenny responded to Mr. Shields' email and, for the first time, contended that Mr. Shields knew Windstream was cancelling SOW4.[267] The Court believes the timing of the exchanges between Mr. Kenny and Mr. Fogle defeats the credibility of Mr. Kenny's statement in the December 3, 2015 email and his testimony at Trial.

The Court finds that Plaintiffs have completely failed to carry their burden of proof on Counts I and II. The evidence just does not support these claims. Based on what was presented at Trial and the Court's determinations as to credibility, this is not a close case. As such, the Court will enter judgment in favor of Defendants on Counts I and II.

[266] PX-169/DX-103.
[267] DX-42.

B. THE COURT FINDS IN FAVOR OF DEFENDANTS ON COUNTERCLAIM I AND COUNTERCLAIM II.

1. Counterclaim I

Through Counterclaim I, Defendants seek a declaration that they did not breach the APA and that FlowShare should release the $500,000 held in the Escrow. The Court has already found that Defendants did not breach the APA when ruling on Plaintiffs' Counts I and II. Accordingly, the Court finds that Defendants have carried their burden of proof and demonstrated that GeoResults and Mr. and Mrs. Shields did not breach the APA or its related agreements. The Court enters judgment in favor of Defendants on Counterclaim I.

2. Counterclaim II

In Counterclaim II, Defendants asset that Plaintiffs breached the Shortfall Agreement. The Court has already held in the Summary Judgment Opinion that the Shortfall Agreement is enforceable and that Plaintiffs had an obligation to make payments under the Shortfall Agreement to Mr. and Mrs. Shields. The Court did not address damages because the factual record had not been fully developed and concerns remained regarding offset if Plaintiffs prevailed on any of their claims. To the extent the record is unclear, the Court is entering judgment in favor of Defendants on Counterclaim II.[268]

3. Damages

The remaining issue is damages. Both parties made presentations on damages at Trial. The Court found the damage experts, Mr. King and Mr. Stephens, to be helpful. The Court also

[268] The Court held that Defendants could only pursue Counterclaim IV as an alternative to Counterclaim II. *See FlowShare, LLC v. GeoResults, Inc.*, 2018 WL 3599810 (Del. Super. July 25, 2018). Having held in favor of Defendants on Counterclaim II, the Court dismisses Counterclaim IV as moot. The facts presented here, however, suggest a very strong situation involving fraudulent inducement. Mr. Fogle's email exchanges with Mr. Verkamp demonstrate that Mr. Fogle made material misrepresentations to Mr. and Mrs. Shields in order to induce them to enter into the Shortfall Agreement. To the extent that it was found (for whatever reason) that the Shortfall Agreement was not enforceable, the Court would need to revisit Counterclaim IV.

found both Mr. King and Mr. Stephens to be credible as they were responsive to the questions presented even if the answer meant conceding a point.

The Court agrees with Defendants' assessment that Defendants' damages fall into six categories: (1) amount in Escrow; (2) shortfall payments; (3) tax effects under APA; (4) tax effects under the Shortfall Agreement; (5) salaries; and, (6) expense reimbursement.[269] Some of these amounts are not disputed. The Court finds that Defendants—whether GeoResults, Mr. Shields or Mrs. Shields—should recover amounts associated with each category. As supported by the evidence adduced at Trial, the Court will award Defendants the amount of $1,249,110 (if $500,000 is included) plus pre-and-post judgment interest.

a. Amount in Escrow

The evidence at Trial demonstrates that the only reason the Escrow was not released to Mr. and Mrs. Shields was because FlowShare made a baseless claim under Escrow Agreement Section 2.2 and APA Article VIII. Accordingly, given the Court's entry of judgment in favor of Defendants on Counterclaim I, Mr. and Mrs. Shields should recover the full $500,000 held in the Escrow.

b. Amounts Due Under the Shortfall Agreement

The calculation of the amounts owed under the Shortfall Agreement is straightforward. Paragraph 2 of the Shortfall Agreement provides:

> If the total consideration received by Seller and Owners from the closing of the APA and Real Estate Purchase Agreement is less than Five Million Five Hundred Thousand Dollars ($5,500,000.00), [FlowShare] shall employ [Mr. and Mrs. Shields] at the rate of pay specified in their employment agreements with FLOWSHARE EMPLOYMENT GROUP, LLC for the time period necessary for [Mr. and Mrs. Shields] to receive compensation income equal to the difference (the "Shortfall") between Five Million Five Hundred Thousand Dollars ($5,500,000.00) and the amount of total consideration received pursuant to the closing of the APA and Real Estate Purchase Agreement. ***Total consideration***

[269] Tr. Day 5 AM at 144-160.

> ***from the APA and Real Estate Purchase Agreement shall mean the cash paid to [GeoResults] and [Mr. and Mrs. Shields] at Closing, plus the Escrow Amount, plus cash on hand retained by [GeoResults]***.[270]

The Court holds that the Shortfall Agreement's language is clear and unambiguous as to total consideration—cash paid at closing to GeoResults and Mr. and Mrs. Shields plus the Escrow Amount plus cash on hand retained by GeoResults.

Mr. and Mrs. Shields received $315,000 from the sale of the real estate, and GeoResults retained $271,445 cash at closing.[271] It is also undisputed that the amount of the escrow was $500,000, and that FlowShare paid $3,919,398 to Mr. and Mrs. Shields at Closing.[272] Using these amounts and applying the formula found in the Shortfall Agreement, Mr. Stephens calculated damages under the Shortfall Agreement as $486,846.[273]

Plaintiffs contend that Defendants are not entitled to any damages with respect to the Shortfall Agreement. Plaintiffs reach this conclusion by claiming that the negative $500,602 working capital adjustment should be deemed cash paid to Mr. and Mrs. Shields at Closing. The Court finds that this argument is contradicted by the plain and unambiguous language in the Shortfall Agreement which only refers to cash received at Closing.

In fact, utilizing Plaintiffs argument, FlowShare would get double credit for the working capital adjustment. Once as it was used to lower the cash paid at closing from $4.4 million to $3.9 million and the second time if characterized as "cash paid" at Closing. Even Mr. King recognized that. Mr. King testified:

> Q. Now, you were here yesterday when Mr. Verkamp testified that the cash received by the Shieldses at closing was approximately $3.9 million correct?

[270] PX-182/DX-444 (emphasis added).
[271] Pre-Trial Order (Trans. ID 63112573), undisputed fact 31.
[272] *Id.* at undisputed facts 24, 31.
[273] Tr. Day 5 AM at 149-151 (explaining calculation and the need to make a deduction of $7,311 "related to some payments in 2016").

A. I understood that to be the amount that was wired to them at closing, yes.

Q. And an amount that's wired to them would be cash received by them?

A. Yes.

* * *

Q. And you are aware that the estimated working capital was actually negative $500,602 right?

A. Correct.

Q. So because the estimated net working capital was negative, that number was deducted from the 4.4 million, meaning that the total cash paid to the Shieldses at closing was 3.9 million as reflected on the fund flow statement that we just looked at right?[274]

A. That's my understanding.

* * *

Q. We agree that the purchase price was reduced from 4.4 million to 3.9 million as a result of the working capital adjustment being negative, correct?

A. Yes.

Q. And as a result of that being negative, you are also aware that FlowShare is never going to pay any portion of that estimated net working capital adjustment back to the Shieldses at any point in the future, you are aware of that, right?

A. Correct.[275]

Mr. King also included an additional $136,447 post-closing adjustment as a way to reduce damages.[276] Mr. King, however, testified that the $136,447 was "not included in any way, positive or negative, in the amount of consideration paid to the Shieldses at Closing."[277]

[274] The funds flow statement was DX-815, and Mr. King testified he never even looked at it. Tr. Day 4 at 25.
[275] *Id*. at 24-30.
[276] *Id*. at 31.
[277] *Id*. at 32.

Because the $136,447 was not included in Closing consideration it is irrelevant to the calculation of the Shortfall Amount.

c. Remaining Undisputed Amounts

Mr. Stephens also testified as to certain other amounts owed to Defendants. The Court finds that Plaintiffs failed to rebut these amounts due. These include:

- Mr. Stephens testified that $128,123 resulting from the sale of GeoResults being treated as an asset sale instead of a stock sale is owed.[278] Mr. King testified that he did not disagree with that calculation.[279]

- Mr. Stephens testified that $114,167 was owed due to resulting tax affecting the Shortfall payment.[280] Mr. King stated that his only real disagreement with Mr. Stephens on this point is that "Mr. Stephens actually finds an amount due under the Shortfall Agreement and tax affects it[.]"[281]

- Mr. Stephens testified that $17,984 was due to Mrs. Shields as amounts due under her employment agreement.[282] Mr. King agreed with that number.[283]

- Mr. Stephens testified that $1,990 was due to Mr. Shields for unreimbursed expenses.[284] Mr. King had no opinion on this.[285]

The Court finds that all these amounts are due as damages under the Shortfall Agreement and the Employment Agreements.

d. Interest

The Court agrees with Defendants that they should receive pre-and-post judgment interest at the legal rate on any damages recovered. An award of pre-judgment interest generally relates back to the date of the loss or injury, *i.e.*, the date when the money should have been

[278] Tr. Day 5 AM at 152-55 (explaining calculation).
[279] Tr. Day 4 at 20 (agreeing that his number was the same as Mr. Stephens).
[280] Tr. Day 5 AM at 155-58 (explaining calculation).
[281] Tr. Day 4 at 21
[282] Tr. Day 5 AM at 158-59.
[283] Tr. Day 4 at 20 (agreeing that his number was the same as Mr. Stephens).
[284] Tr. Day 5 AM at 159-60.
[285] Tr. Day 4 at 20.

paid.[286] With respect to pre-judgment interest, that date is December 31, 2015.[287] The right to post-judgment interest attaches upon the entry of a judgment.[288] The rate of interest allowed in actions at law generally is equated to the "legal rate" of interest described in 6 *Del. C.* § 2301.[289]

The Court will allow Defendants thirty days from the date of this decision to submit a total for such interest.

VI. VERDICT AND JUDGMENT

Count I: For Defendants

Count II: For Defendants

Counterclaim I: For Defendants

Counterclaim II: For Defendants

Counterclaim IV: Moot

Damages: For Defendants: $1,249,110 (if $500,000 is included) plus pre-and-post judgment interest.

IT IS SO ORDERED.

/s/ Eric M. Davis
Eric M. Davis, Judge

cc: File&ServeXpress

[286] *Stonewall Ins. Co. v. E.I. du Pont de Nemours & Co.*, 996 A.2d 1254, 1262 (Del. 2010); *Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481, 508 (Del. 2001).
[287] DX-398; Tr. Day 4 at 222-223.
[288] *Wilm. Country Club v. Cowee*, 747 A.2d 1087, 1097 (Del. 2000).
[289] *Rollins Envtl. Servs., Inc. v. WSMW Indus., Inc.*, 426 A.2d 1363, 1367 (Del. Super. 1980).